

December 30, 2005

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.

  
ELIZABETH PERRIS  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 04-37154-elp11
ROMAN CATHOLIC ARCHBISHOP OF	)	
PORTLAND IN OREGON, AND SUCCESSORS,	)	
A CORPORATION SOLE, dba the	)	
ARCHDIOCESE OF PORTLAND IN OREGON,	)	
	)	
Debtor.	)	
<hr/>		
TORT CLAIMANTS COMMITTEE,	)	Adv. Proc. No. 04-3292
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	(TORT CLAIMANTS COMMITTEE'S
v.	)	SECOND RESTATED MOTION FOR
	)	PARTIAL SUMMARY JUDGMENT)
ROMAN CATHOLIC ARCHBISHOP OF	)	
PORTLAND IN OREGON, AND SUCCESSORS,	)	
A CORPORATION SOLE, dba the	)	
ARCHDIOCESE OF PORTLAND IN OREGON,	)	
et al.,	)	
	)	
Defendants.	)	

The Roman Catholic Archbishop of Portland in Oregon, and Successors,  
a Corporation Sole, dba the Archdiocese of Portland in Oregon ("debtor"

1 or "the Archdiocese") filed a chapter 11<sup>1</sup> case in 2004. The Archdiocese  
2 has taken the position that, although it holds legal title to  
3 approximately \$98 million in deposits and investment accounts<sup>2</sup> and an  
4 extensive amount of real estate, most of that property is held in trust  
5 and, thus, is not available to be used to pay the claims of creditors.  
6 The Tort Claimants Committee ("TCC") seeks a determination in this  
7 adversary proceeding that the property is property of debtor's bankruptcy  
8 estate and is not subject to any interests of anyone else, and to use the  
9 bankruptcy trustee's powers as a hypothetical bona fide purchaser to  
10 avoid any unrecorded interests of third parties in the disputed real  
11 property.

12 The TCC has filed a series of motions for summary judgment, seeking  
13 a determination of various aspects of the pending proceeding. It seeks  
14 in this Second Restated Motion for Partial Summary Judgment a  
15 determination that debtor's and other defendants' affirmative defenses of  
16 lack of subject matter jurisdiction and religious freedom are without  
17 merit. It also seeks a declaration that debtor's "parishes and schools  
18 have no legal existence separate from or independent of Debtor and do not  
19 have the capacity to sue or be sued." Tort Claimants Committee's  
20 Restated Second Motion for Partial Summary Judgment ¶ 4. Responses to  
21 this motion were filed by associations or groups representing the  
22

---

23 <sup>1</sup> Unless otherwise indicated, all chapter and section references  
24 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

25 <sup>2</sup> This total comes from the amounts listed in the TCC's First  
26 Amended Complaint ¶ 24. The complaint took the figures from debtor's  
bankruptcy Schedule B.

1 interests of Marist High School, Central Catholic High School, Regis High  
2 School, and the Committee of Catholic Parishes, Parishioners and  
3 Interested Parties ("Parish Committee").<sup>3</sup> Where those non-debtor  
4 defendants' arguments align with debtor's, I will not separately address  
5 them, but will consider the arguments made by debtor as including the  
6 arguments made by the other defendants.

7 Debtor in turn filed a cross-motion for partial summary judgment, in  
8 which it seeks summary judgment on certain issues. At bottom, its cross-  
9 motion seeks a determination that the debtor and the parishes are  
10 separate entities.<sup>4</sup>

---

11  
12 <sup>3</sup> The Missionaries of the Holy Spirit also filed an opposition.  
13 The TCC's Restated Second Motion for Partial Summary Judgment seeks a  
14 ruling on all defendants' defenses of lack of jurisdiction and religious  
15 freedom, which include such defenses raised by the Missionaries of the  
16 Holy Spirit. The portion of the TCC's motion seeking a determination of  
whether parishes and schools have separate legal existence does not  
relate to the property in which the Missionaries of the Holy Spirit  
assert an interest.

17 An opposition was also filed by Phoebe Joan O'Neill. She joins the  
18 oppositions of debtor and the Parish Committee to the TCC's Second  
19 Restated Motion for Partial Summary Judgment as well as the cross-motion  
for summary judgment of debtor. She does not make any separate  
arguments.

20 <sup>4</sup> Debtor's cross-motion seeks summary judgment on the following  
21 issues:

22 1. The Debtor is, under Oregon corporation law, a corporation  
23 sole. A corporation sole is the incorporation of an office - here,  
24 the office of the Archbishop of the Archdiocese of Portland in  
Oregon.

25 2. A Catholic bishop solemnly vows during his ordination to  
26 conduct his entire ministry and administration as a bishop in  
(continued...)

1 I. PRELIMINARY MATTERS

2 There are a number of preliminary matters raised by the parties. I  
3 have ruled on those matters in a separate order, entered this date.

4 II. STANDARD FOR SUMMARY JUDGMENT

5 The court shall grant a party summary judgment on all or part of a

6  
7 <sup>4</sup>(...continued)  
8 accordance with Catholic and Canon Law.

9 3. Oregon law requires the Debtor to function and govern its  
10 affairs in accordance with the constitution, canons, rules,  
11 regulations, disciplines, doctrine, and practice of the Roman  
12 Catholic Church.

13 4. The Debtor's Articles of Incorporation require the Debtor  
14 to function and govern its affairs in accordance with the doctrine,  
15 canons, rules, and usages of the Roman Catholic Church.

16 5. The First Amendment guarantees that religious institutions  
17 have the power to decide for themselves, free from state  
18 interference, matters of church government, faith, and doctrine -  
19 including the definition and creation of ecclesial entities like  
20 Catholic parishes and the empowering of church officials to pastor  
21 and administer such parishes and their property. Catholic  
22 institutions define their governance through Canon Law.

23 6. The Court must consider Canon Law in determining whether  
24 the Parishes are entities separate from the Debtor.

25 7. The Parishes and the Debtor are separate entities.

26 Debtor's Cross Motion for Partial Summary Judgment at 2-3. The first six  
issues are facts or legal conclusions debtor asserts in support of its  
affirmative defenses and opposition to the TCC's claim that the parishes  
and debtor are one legal entity. I will not expressly consider the first  
six points or rule on them for summary judgment, because they are not  
elements of a claim or defense, but are merely arguments or factual  
support for those claims or defenses. To the extent any of the factual  
assertions or legal conclusions are relevant to my decision in this  
adversary proceeding, I will address them in the discussion, but will not  
expressly grant or deny summary judgment as to them.

1 claim or counterclaim "if the pleadings, depositions, answers to  
2 interrogatories, and admissions on file, together with the affidavits, if  
3 any, show that there is no genuine issue as to any material fact and that  
4 the moving party is entitled to a judgment as a matter of law." Fed. R.  
5 Civ. P. 56(c); Fed. R. Bankr. P. 7056.

### 6 III. UNDISPUTED FACTS

7 Debtor is a corporation sole organized under Oregon's nonprofit  
8 corporations laws. It does business as the Archdiocese of Portland in  
9 Oregon.

10 The Archdiocese is an ecclesiastical province of the Roman Catholic  
11 Church, which is a hierarchical church headed by the Pope. The  
12 Archbishop of the Archdiocese ("the Archbishop") has legislative,  
13 executive and judicial power within his Archdiocese. Within the  
14 Archdiocese of Portland are 124 parishes. The parishes operate with some  
15 autonomy from debtor, although the Archbishop has ultimate say over  
16 administrative matters of the parishes. Only one parish in the  
17 Archdiocese, St. Elizabeth Parish, is separately incorporated as a  
18 nonprofit corporation. The rest of the parishes are not separately  
19 incorporated. The Archbishop has the authority to and has suppressed  
20 parishes within the Archdiocese.

21 The Archdiocese also has three high schools, which are not connected  
22 to any parish and are not separately incorporated ("the Archdiocesan  
23 schools").<sup>5</sup>

---

24  
25 <sup>5</sup> Those high schools are Regis High School, Central Catholic High  
26 (continued...)

1 The TCC filed this adversary proceeding to obtain a determination of  
2 whether the disputed personal and real property is property of the  
3 bankruptcy estate, and to avoid the interests of others in the disputed  
4 real property. In debtor's and the other defendants' answers, they  
5 raised affirmative defenses, including claims that this court lacks  
6 jurisdiction over the proceeding, and that adjudication of this complaint  
7 could entangle the court in religious matters in violation of state and  
8 federal law. This summary judgment motion and cross-motion addresses  
9 First Amendment and other religious freedom defenses, as well as whether  
10 the parishes and schools are legal entities separate from debtor. It  
11 does not address whether anyone other than debtor holds any interests in  
12 the disputed property.

#### 13 IV. DISCUSSION

##### 14 1. Jurisdiction

15 Debtor alleges as an affirmative defense to the TCC's complaint  
16 that, "[t]o the extent this Court does not have jurisdiction over one or  
17 more of Plaintiff's claims, such claims should be dismissed for lack of  
18 jurisdiction." Defendant Debtor's Answer and Affirmative Defenses at  
19 ¶ 50.<sup>6</sup> Debtor argues that it does not dispute the court's authority to  
20 determine what is property of the bankruptcy estate, but raises the  
21 defense as a precaution against the court's exceeding the limitations on  
22

---

23 <sup>5</sup>(...continued)  
24 School, and Marist High School.

25 <sup>6</sup> To the extent other defendants raise a similar affirmative  
26 defense, this summary judgment proceeding is intended to apply to the  
similar defenses.

1 its jurisdiction that are imposed by the First Amendment.

2 The Parish Committee argues that I should not resolve this issue  
3 now, because the court could at some time in the future exceed its  
4 jurisdiction, so the defense is not ready for determination. It argues  
5 that the court has an obligation not to decide constitutional questions  
6 if it need not do so, and that the parties agree that the court can apply  
7 neutral principles of law to decide this case, without implicating  
8 constitutional questions.

9 Although the parties seem to agree that I can apply neutral  
10 principles of law to determine questions about what is property of the  
11 estate, they disagree about what that means. Because this jurisdictional  
12 question will continue to be an issue if I do not decide it, I will  
13 address it now rather than later in order to move this case toward a  
14 resolution.

15 A. Bankruptcy court's jurisdiction to determine property of the  
16 estate

17 The filing of a bankruptcy petition creates an estate, which is made  
18 up of "all legal or equitable interests of the debtor in property as of  
19 the commencement of the case." § 541(a)(1). Property of the estate does  
20 not include property "in which the debtor holds, as of the commencement  
21 of the case, only legal title and not an equitable interest . . . ."  
22 § 541(d).

23 District courts are granted original and exclusive jurisdiction over  
24 bankruptcy cases, and original but not exclusive jurisdiction over civil  
25 proceedings arising under the Bankruptcy Code. 28 U.S.C. § 1334(a), (b).  
26 As allowed by statute, the United States District Court for the District

1 of Oregon has referred its bankruptcy cases and related proceedings to  
2 the bankruptcy court. U.S. District Court of Oregon Local Rule 2100.1;  
3 28 U.S.C. § 157(a). Bankruptcy judges may hear and determine matters  
4 concerning the administration of the bankruptcy estate. 28 U.S.C.  
5 § 157(b). There is no question, and the parties do not seem to dispute,  
6 that this court has jurisdiction to determine whether property for which  
7 debtor holds legal title but claims not to hold equitable title is  
8 property of the estate.

9 The issue arises with regard to limitations on that jurisdiction.  
10 The parties dispute the extent to which the First Amendment's religion  
11 clauses limit the bankruptcy court's jurisdiction to determine what is  
12 property of the bankruptcy estate when the debtor is, as in this case, a  
13 religious organization.<sup>7</sup>

14 B. First Amendment limitations on jurisdiction

15 The First Amendment to the United States Constitution provides that  
16 "Congress shall make no law respecting an establishment of religion, or  
17 prohibiting the free exercise thereof. . . . ." These protections have  
18 two aspects: the law may not require a person to accept any particular  
19 creed or form of worship, nor may it restrict a person's right to  
20 exercise a chosen form of religion. "Thus, the Amendment embraces two  
21 concepts, -- freedom to believe and freedom to act." Cantwell v. State  
22 of Connecticut, 310 U.S. 296, 303 (1940).

23 Out of these protections of religious freedom has grown a  
24 restriction on the jurisdiction of the courts to decide certain disputes

---

25 <sup>7</sup> The parties do not make any Oregon constitutional arguments.  
26



1 touching on religious matters. The TCC calls the restriction the  
2 "ecclesiastical abstention" doctrine; debtor calls it "church autonomy  
3 law." By whatever label, the concept is well-established. "[T]he First  
4 Amendment prohibits civil courts from resolving church property disputes  
5 on the basis of religious doctrine and practice." Jones v. Wolf, 443  
6 U.S. 595, 602 (1979). Religious organizations have the freedom "to  
7 decide for themselves, free from state interference, matters of church  
8 government as well as those of faith and doctrine." Kedroff v. St.  
9 Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116  
10 (1952).

11 The restriction on the court's jurisdiction does not mean that it  
12 may never adjudicate matters involving church property, however.

13 Thus, the First Amendment severely circumscribes the role that  
14 civil courts may play in resolving church property disputes. It is  
15 obvious, however, that not every civil court decision as to property  
16 claimed by a religious organization jeopardizes values protected by  
17 the First Amendment. Civil courts do not inhibit free exercise of  
18 religion merely by opening their doors to disputes involving church  
19 property. And there are neutral principles of law, developed for  
20 use in all property disputes, which can be applied without  
21 "establishing" churches to which property is awarded. But First  
22 Amendment values are plainly jeopardized when church property  
23 litigation is made to turn on the resolution by civil courts of  
controversies over religious doctrine and practice. If civil courts  
undertake to resolve such controversies in order to adjudicate the  
property dispute, the hazards are ever present of inhibiting the  
free development of religious doctrine and of implicating secular  
interests in matters of purely ecclesiastical concern. . . . [T]he  
Amendment therefore commands civil courts to decide church property  
disputes without resolving underlying controversies over religious  
doctrine. Hence, States, religious organizations, and individuals  
must structure relationships involving church property so as not to  
require the civil courts to resolve ecclesiastical questions.

24 Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l  
25 Presbyterian Church, 393 U.S. 440, 449 (1969).

1 The TCC argues that this limitation on the power of courts to decide  
2 matters involving church government and doctrine has been applied only in  
3 intra-church disputes, that is, in disputes between competing factions of  
4 a religious organization or some other internal church dispute. It  
5 relies on Justice Rehnquist's single-justice ruling on an order denying a  
6 stay, in Gen. Council on Fin. and Admin. of the United Methodist Church  
7 v. Superior Court of Cal., 439 U.S. 1369 (1978), in which he said:

8 In my view, applicant plainly is wrong when it asserts that the  
9 First and Fourteenth Amendments prevent a civil court from  
10 independently examining, and making the ultimate decision regarding,  
11 the structure and actual operation of a hierarchical church and its  
12 constituent units in an action such as this. There are  
13 constitutional limitations on the extent to which a civil court may  
14 inquire into and determine matters of ecclesiastical cognizance and  
15 polity in adjudicating intrachurch disputes. But this Court never  
16 has suggested that those constraints similarly apply outside the  
17 context of such intraorganization disputes. . . . [The] cases are  
18 premised on a perceived danger that in resolving intrachurch  
19 disputes the State will become entangled in essentially religious  
20 controversies or intervene on behalf of groups espousing particular  
21 doctrinal beliefs. Such considerations are not applicable to purely  
22 secular disputes between third parties and a particular defendant,  
23 albeit a religious affiliated organization, in which fraud, breach  
24 of contract, and statutory violations are alleged.

25 439 U.S. at 1372-73.

26 Debtor argues that I need not follow this opinion, because it is the  
ruling of a single Supreme Court justice and not the entire Court. I  
need not decide whether Justice Rehnquist's view is binding, because the  
question of whether property is part of the bankruptcy estate under the  
Bankruptcy Code does not require that I resolve matters of faith,  
doctrine, or governance.<sup>8</sup> If it is appropriate for this court to

---

<sup>8</sup> Debtor provides the declaration of Margaret Hoffmann explaining  
(continued...)

1 consider internal church law to resolve that dispute, a matter that I  
2 will discuss later in this opinion, that consideration will entail simply  
3 determining what the internal church law is, not resolving any disputes  
4 about faith, doctrine, or church polity.

5 The parties in this case seek a determination of whether particular  
6 property titled in the name of debtor belongs to debtor or belongs  
7 instead to parishes, schools, or others. Whether or not such a  
8 determination allows or requires this court to consider the Roman  
9 Catholic Church's internal law, called the Code of Canon Law, it does not  
10 require resolution of a dispute over matters of church government,  
11 doctrine, or faith.<sup>9</sup> Who owns the property is, quite simply, not a

12 \_\_\_\_\_  
13 <sup>8</sup>(...continued)  
14 that many of the tort claimants were associated with the church at the  
15 time of the alleged sexual abuse. This evidence presumably is offered to  
16 show that this is not a third-party dispute, but instead is a dispute  
17 between the church and its followers. Whether or not the alleged victims  
18 of sexual abuse were affiliated with the church at the time of the  
19 alleged misconduct, no one argues that the misconduct was required or  
20 permitted by church doctrine. Further, even if the alleged victims could  
21 be considered to be within the church and therefore not third parties,  
22 the claim of the TCC that any unrecorded property interests may be  
23 avoided under § 544(a)(3) of the Bankruptcy Code is a claim on behalf of  
24 the bankruptcy estate. There can be no doubt that, if a trustee were  
25 appointed in this case, the trustee would be third party with no previous  
26 association with the church. Thus, to the extent the TCC is asserting a  
claim on behalf of the estate, it is a third party, even if individual  
claimants would not be.

27 <sup>9</sup> I agree with the Bankruptcy Court for the Eastern District of  
28 Washington that, if the First Amendment deprived the bankruptcy court of  
29 jurisdiction to adjudicate the fundamental question of whether, in a  
30 voluntary bankruptcy case filed by a religious organization, property  
31 held by the debtor is property of the bankruptcy estate, the proper  
32 remedy might well be dismissal of the case. See In re Catholic Bishop of  
33 (continued...)

1 theological or doctrinal matter.

2 Debtor argues that, if this court does not apply the church's canon  
3 law view of property ownership in the civil law bankruptcy arena, the  
4 result will be a rearrangement of the church's polity in violation of the  
5 First Amendment. I disagree. Debtor, as a religious organization, is  
6 free to organize its internal affairs in accordance with its internal  
7 church law. It has choices about how to organize itself under civil law  
8 in a way that recognizes and implements its internal organization with  
9 relation to the secular world. A court's enforcement of the consequences  
10 of those choices, whether or not they accurately reflect the church's  
11 internal property-ownership view, neither rearranges the church's polity  
12 in violation of the First Amendment nor interferes with the church's  
13 right to make those choices.

14 Because this court has jurisdiction over the question presented in  
15 this adversary proceeding, which is whether the disputed property belongs  
16 to the bankruptcy estate, I will grant summary judgment to the TCC on the  
17 defendants' affirmative defenses of lack of subject matter jurisdiction.

18 2. Religious freedom defense

19 Debtor argues under various theories that this court is required to  
20 consider and apply internal church law to determine what is property of  
21 the bankruptcy estate. It raises this issue as an affirmative defense,  
22 claiming that "[t]he adjudication of the Complaint could potentially  
23 entangle the Court in religious matters in violation of the First  
24

---

25 <sup>9</sup>(...continued)  
26 Spokane, 329 B.R. 304, 324 n.5 (Bankr. E.D. Wa. 2005).

1 Amendment of the United States Constitution, Oregon law, and other  
2 applicable nonbankruptcy law." Defendant Debtor's Answer and Affirmative  
3 Defenses to Plaintiff's First Amended Complaint ¶ 52. This raises the  
4 issue of whether, in deciding whether the disputed property is property  
5 of the estate, I must consider not only neutral state law but also the  
6 Code of Canon Law.<sup>10</sup>

7 A. First Amendment

8 As I have said, in order to respect the religious freedoms provided  
9 by the First Amendment, the courts have recognized certain restrictions  
10 on resolution of disputes that involve religious institutions. Courts  
11 can, for example, resolve intra-church property disputes by deferring to  
12 decisions of the highest authority of a hierarchical church. E.g.,  
13 Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). None of the parties to  
14 this dispute advocate for such an approach in this case.<sup>11</sup>

15 Courts also may resolve disputes involving church property by  
16 applying neutral

17 secular principles of property, trust and corporate law when the  
18 instruments upon which those principles operate are at hand. Thus

---

19 <sup>10</sup> It is not clear whether all theories argued in this summary  
20 judgment proceeding in support of application of canon law arise under  
21 the religious freedom affirmative defense, or are simply arguments in  
22 support of debtor's cross-motion for summary judgment on the question of  
23 whether the parishes are separate legal entities from debtor. I will  
24 discuss all theories under the religious freedom affirmative defense  
25 heading, but I recognize that not all theories may technically fit under  
26 this defense. All theories are, however, appropriate for consideration  
in this motion, no matter how they are categorized.

<sup>11</sup> There is no evidence that the highest authority in the Roman  
Catholic Church has adjudicated this dispute about the ownership  
interests in property held by debtor.

1 no First Amendment issue arises when a court resolves a church  
2 property dispute by relying on state statutes concerning the holding  
3 of religious property, the language in the relevant deeds, and the  
4 terms of corporate charters of religious organizations.

5 Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244,  
6 1249 (9th Cir. 1999). As the Supreme Court explained:

7 The primary advantages of the neutral-principles approach are  
8 that it is completely secular in operation, and yet flexible enough  
9 to accommodate all forms of religious organization and polity. The  
10 method relies exclusively on objective, well-established concepts of  
11 trust and property law familiar to lawyers and judges. It thereby  
12 promises to free civil courts completely from entanglement in  
13 questions of religious doctrine, polity, and practice. Furthermore,  
14 the neutral-principles analysis shares the peculiar genius of  
15 private-law systems in general--flexibility in ordering private  
16 rights and obligations to reflect the intentions of the parties.  
17 Through appropriate reversionary clauses and trust provisions,  
18 religious societies can specify what is to happen to church property  
19 in the event of a particular contingency, or what religious body  
20 will determine ownership in the event of a schism or doctrinal  
21 controversy.

22 Jones v. Wolf, 443 U.S. 595, 603 (1979).

23 Bankruptcy Code § 541 defines property of a bankruptcy estate;  
24 property interests are created and defined by state law. Butner v.  
25 United States, 440 U.S. 48, 55 (1979). Therefore, consistent with First  
26 Amendment jurisprudence and the Bankruptcy Code, I will apply neutral  
secular principles of state law in order to determine the issues  
presented in this adversary proceeding.

Debtor argues that, in applying neutral principles of law, I must  
consider not only state corporate and property law, but also canon law,  
because that law defines the relationship between the Archbishop and the  
parishes.

As I explained above, however, neutral principles of law require

1 application of secular neutral principles, not sacred ones. The  
2 religious organization's internal law is not relevant to the dispute,  
3 unless neutral principles of civil law make it so. There is no  
4 constitutional requirement that internal church law be considered in  
5 determining a purely secular dispute.<sup>12</sup>

6 B. State corporate law

7 Debtor argues that, under Oregon statutes relating to corporations  
8 sole, internal church law is relevant and, indeed, must be applied in  
9 determining the legal status of parishes within the Archdiocese. The TCC  
10 argues that it would violate the First Amendment if the court considered  
11 internal church law. Because I disagree with debtor that Oregon  
12 corporate law requires application of canon law to disputes about  
13 ownership of church or parish property, I need not discuss whether  
14 applying canon law would violate the First Amendment.

15 Debtor relies on four different statutes in its argument that canon  
16 law is incorporated into state law for corporations sole. First is the  
17 corporation sole statute, which provides, as relevant:

18 Any individual may, in conformity with the constitution, canons,  
19 rules, regulations and disciplines of any church or religious  
20 denomination, form a corporation hereunder to be a corporation sole.

---

21  
22  
23 <sup>12</sup> There are situations in which a court needs to consider a  
24 church's internal law in deciding a secular dispute, for example, in  
25 determining whether a church employee was acting within the course and  
26 scope of employment when the employee committed a tort. E.g., M.K. v.  
Archdiocese of Portland in Oregon, 228 F. Supp. 2d 1168 (D. Or. 2002).  
This case does not present such an issue.

1 ORS 65.067(1).<sup>13</sup> Debtor argues that the reference in the statute to "the  
2 constitution, canons, rules, regulations and disciplines of any church or  
3 religious denomination" means that those canons and other disciplines  
4 must necessarily be applied to all activities of the church. That is not  
5 what the statute says. I agree with Judge Williams in the Spokane  
6 diocese bankruptcy case, who said that similar language in a Washington  
7 statute refers to the authority under church law of the individual to  
8 form a corporation sole under state law, but it does not require that all  
9 dealings of the church with the secular world be governed by that  
10 internal law. In re Catholic Bishop of Spokane, 329 B.R. 304, 326  
11 (Bankr. E.D. Wa. 2005).

12 That is not to say (and Judge Williams did not say) that the  
13 church's canons and other rules and disciplines are irrelevant once the  
14 corporation sole is formed. Debtor argues at length that the corporation  
15 sole must be governed according to the canon law of the Roman Catholic  
16 Church. I have no reason to doubt that argument, and nothing in the  
17 corporation sole statute precludes the corporation from operating  
18 according to internal church doctrine. However, neither does the statute  
19 require the corporation to follow its internal law; that is a matter  
20 between the incorporator and the authorities of the church.

21 Next, debtor cites ORS 65.042, which provides:

22 If religious doctrine or practice governing the affairs of a  
23

---

24 <sup>13</sup> Debtor was actually incorporated under the original version of  
25 the corporation sole statute, which was enacted in 1872. Although the  
26 language of the statute has changed over the years, the changes are not  
significant in ways that affect this case.



1 religious corporation is inconsistent with the provisions of this  
2 chapter on the same subject, the religious doctrine or practice  
3 shall control to the extent required by the Constitution of the  
4 United States or the Constitution of this state, or both.

5 Debtor reads this statute as a broad directive that religious doctrine  
6 controls debtor's relationship with the secular world. That is not what  
7 the statute says. The statute requires application of religious doctrine  
8 if two requirements are met: (1) the religious doctrine is inconsistent  
9 with the provisions of ORS chapter 65 on the same subject, and (2)  
10 application of religious doctrine is required by the state or federal  
11 constitution. Debtor does not point to any inconsistency between the  
12 provisions of ORS chapter 65 and canon law, nor does it explain why  
13 either the state or federal constitution would require application of  
14 religious doctrine to all of a religious corporation's relationships with  
15 the secular world.

16 Further, the statute refers only to chapter 65, which is the chapter  
17 dealing with non-profit corporations. Even if canon law were  
18 inconsistent with state property or trust law, ORS 65.042 would not  
19 provide debtor with authority for application of canon law to property or  
20 trust law issues.

21 Finally, debtor relies on two statutes setting out standards of  
22 conduct for officers and directors of non-profit corporations. Both  
23 statutes say that, in discharging duties as an officer or director of a  
24 religious corporation, the officer or director "is entitled to rely on  
25 information, opinions, reports or statements, including financial  
26 statements and other financial data," presented or prepared by "religious  
authorities and ministers, priests, rabbis or other persons whose

1 position or duties in the religious organization the [officer or  
2 director] believes justify reliance and confidence and whom the [officer  
3 or director] believes to be reliable and competent in the matters  
4 presented." ORS 65.357(2)(d)(relating to directors); ORS 65.377(2)(c)  
5 (relating to officers).

6 The fact that an officer or director of a corporation sole may rely  
7 on religious authorities or personnel in discharging his duties does not  
8 require application of canon law to all of the corporation's  
9 relationships or interaction with the secular world, including its need  
10 to follow the formalities of state property or trust law with regard to  
11 property it holds.

12 The history of religious corporations in general and corporations  
13 sole in particular supports the conclusion that a religious  
14 organization's property rights are governed by state law, not internal  
15 church law. Before the advent of state-sanctioned religious  
16 corporations, religious organizations experienced difficulties with how  
17 to continue operation of the organization during a vacancy in the office  
18 of the bishop or other church leader, and how to hold church property so  
19 that the church would retain ownership in perpetuity. See, e.g., James  
20 B. O'Hara, The Modern Corporation Sole, 93 Dick. L. Rev. 23 (1988).  
21 Property that was given to or otherwise acquired by the religious  
22 organization would sometimes be held in fee simple by the parish priest.  
23 But that method of ownership was problematic because, upon the priest's  
24 death, the property might be claimed by the priest's heirs. Id. at 29.  
25 Property would sometimes be held by trustees in trust for the religious  
26

1 organization, but that also caused difficulties when the trustees died,  
2 resigned, or "became obstreperous." Carl Zollmann, Classes of American  
3 Religious Corporations, 13 Mich. L. Rev. 566, 574 (1914).<sup>14</sup>

4 As a result of these types of difficulties, many states, including  
5 Oregon, enacted statutes allowing for the formation of religious  
6 corporations in general and corporations sole in particular. See Patrick  
7 J. Dignan, A History of the Legal Incorporation of Catholic Church  
8 Property in the United States 214-244 (1933). The corporation sole was a  
9 corporate form that allowed the Roman Catholic Church to incorporate "in  
10 a manner consistent with church polity." O'Hara, The Modern Corporation  
11 Sole, 93 Dick. L. Rev. at 31. Under this then-new statutory form of  
12 corporation, perpetual corporate succession was assured, and the church  
13 existed in a form that could hold property in a way that would be  
14 recognized under state law. Id.; Carl Zollmann, Classes of American  
15 Religious Corporations, 13 Mich. L. Rev. at 575.

16 Given this history and the reason for the enactment of the  
17 corporation sole statute, it is apparent that religious organizations,  
18 including the Roman Catholic Church, recognized the need to conduct  
19 church affairs in accordance with state law, at least insofar as

---

20  
21 <sup>14</sup> For a good outline of the history of forms of church property  
22 ownership and statutory corporations sole, relating to both religious  
23 organizations in general and the Roman Catholic Church in particular, see  
24 Patrick J. Dignan, A History of the Legal Incorporation of Catholic  
25 Church Property in the United States (1933); James B. O'Hara, The Modern  
26 Corporation Sole, 93 Dick. L. Rev. 23 (1988); Carl Zollmann, Classes of  
American Religious Corporations, 13 Mich. L. Rev. 566 (1914); Carl  
Zollmann, Powers of American Religious Organizations, 13 Mich. L. Rev.  
646 (1914); Carl Zollmann, Nature of American Religious Corporations, 14  
Mich. L. Rev. 37 (1915).

1 protecting the property interests of the church was concerned.<sup>15</sup> This  
2 indicates an understanding that canon law alone did not protect those  
3 property rights, whatever they might be, in the secular world in which  
4 the church operates.

5 As I have already said, I accept the fact that the Archbishop, in

6  
7 <sup>15</sup> One commentator on the Code of Canon Law explains that problems  
8 arise

9 when the civil-law structure of a diocese does not mirror, or is  
10 otherwise incompatible with, the canonical structure, resulting in  
11 divergent views of the ownership of church-related property and of  
12 the appropriate persons to administer and alienate such property. A  
13 prime illustration exists in those dioceses in the United States  
14 where the diocese is civilly structured as a corporation sole. In  
15 such a diocese all, or nearly all, church-related assets are civilly  
16 owned by a single corporation whose sole member is the diocesan  
17 bishop. While such a structure is considered desirable by some  
18 because of the high degree of centralized control it affords, and  
19 because of its capacity to offer ample collateral as security for  
20 large construction and other loans, the corporation sole is viewed  
21 by others as highly undesirable from the viewpoint of liability,  
22 exposing as it does all parochial and other church-related assets  
23 within a diocese to satisfy creditors' claims against any individual  
24 parish or institution, and because centralized ownership and control  
25 of all church property within a diocese is contrary to the law of  
26 the Church.

19 Robert T. Kennedy, New Commentary on the Code of Canon Law 1457 (John P.  
20 Beal, et al., 2000). The same commentator notes that, in nations such as  
the United States,

21 it is necessary . . . to seek civil-law recognition, with  
22 accompanying civil-law capacity for the ownership of temporal goods,  
23 through incorporation or some other civil-law structuring of  
ecclesiastical entities such as dioceses and parishes and of other  
24 church-related institutions . . . . Once civil-law status has been  
acquired, the entity then has two sovereigns, canonical and civil,  
25 and is subject to the provisions of two legal systems.

26 Id. at 1456.

1 discharging his duties as a corporation sole and as an Archbishop, is  
2 bound to apply and follow canon law in the governance of the Archdiocese.  
3 That does not mean that this court is also required to apply and be bound  
4 by that internal church doctrine in deciding the purely secular matter of  
5 property interests under the Bankruptcy Code and state law.

6 Oregon corporation sole law allows corporations sole to operate in  
7 accordance with church law. Thus, it allows the corporation to structure  
8 its organization under the civil law in a way that recognizes and  
9 effectuates canon law. It does not, however, require that civil courts  
10 rely on canon law to determine rights in property held by the corporation  
11 sole. In other words, although a corporation sole is authorized by state  
12 law to organize its affairs pursuant to canon law, it is the  
13 corporation's organization and structure as implemented under civil law  
14 that governs the corporation's relationship with the secular world.

15 I conclude that Oregon's corporation sole statutes do not require  
16 application of canon law in determining interests in church property  
17 under state law.

18 C. Debtor's articles of incorporation

19 Debtor argues that its own articles of incorporation "import canon  
20 law into the corporation's governance law," Debtor's Brief in Response to  
21 Tort Claimants Committee's Restated Second Motion for Partial Summary  
22 Judgment at 13, and therefore canon law must be applied to the property  
23 dispute in this case.

24 Debtor relies on references to canon law in the 1874 articles of  
25 incorporation, including those that provide that the incorporator,  
26

1 Archbishop Blanchet, was "duly appointed . . . in conformity with the  
2 Constitution, canons, rules, usages and regulations of [the] Church,"  
3 that Archbishop Blanchet and his "successors in office [who have been]  
4 duly appointed, authorized and empowered as such, according to the canons  
5 usages and regulations of the Church . . . shall become a body corporate  
6 and a corporation sole," and that "the object and purpose of this  
7 corporation is to provide for and maintain the worship of Almighty God,  
8 and the preaching of the Gospel of our Lord Jesus Christ, according to  
9 the doctrine, canons, rules and usages of the Roman Catholic Church[.]"  
10 Articles of Incorporation of the Roman Catholic Archbishop of the Diocese  
11 of Oregon (Declaration of Thomas W. Stilley, Exh. 1 at 3-4).<sup>16</sup>

12 \_\_\_\_\_  
13 <sup>16</sup> Specifically, debtor points to seven references to canon law in  
14 the articles of incorporation and the supplementary articles of  
15 incorporation. The original articles provide the following five  
16 references to canon law:

17 [T]hat I, Francis Norbert Blanchet, Archbishop of the Roman Catholic  
18 Church for the Diocese of Oregon, . . . and being the duly appointed  
19 Archbishop of said Church for said Diocese, in conformity with the  
20 Constitution canons, rules, usages and regulations of said Church,  
21 and authorized to act for it, . . . do hereby make and subscribe  
22 these Articles of Incorporation . . . .

23 [T]hat I as Archbishop aforesaid, together with my successors in  
24 office or position, duly appointed, authorized and empowered as  
25 such, according to the canons usages and regulations of the Church  
26 aforesaid, shall become a body corporate and a corporation sole . .  
27 . .

28 That the object and purpose of this corporation is to provide for  
29 and maintain the worship of Almighty God, and the preaching of the  
30 Gospel of our Lord Jesus Christ, according to the doctrine, canons,  
31 rules and usages of the Roman Catholic Church; . . . .

(continued...)

1 Those references indicate that the Archbishop holds office, and his  
2 successors will hold office, in accordance with canon law. They allow  
3 for operation of the corporation sole according to the doctrines and

4  
5 <sup>16</sup>(...continued)

6 4th. That the title of the undersigned, corporator, making these  
7 articles, is "Archbishop of the Diocese of Oregon" and the  
8 undersigned as such Archbishop, and his successor or successors,  
9 will hold said office or position, in said Diocese, under the  
10 canons, rules and usages of the Roman Catholic Church . . . .

11 [W]hensoever said office or position shall become vacant . . . , his  
12 successor shall and will be chosen and appointed, under and in  
13 accordance with the canons, rules and regulations of said church . .  
14 . .

15 Transcript of September 23, 1874 Articles of Incorporation, attached as  
16 Exhibit 1 to the Declaration of Thomas Stilley, filed September 19, 2005.

17 The supplementary articles of incorporation, filed on December 6,  
18 1939, which transfer the seat of the Archdiocese from Oregon City to  
19 Portland, are subscribed and sworn by the Chancellor of the Archdiocese  
20 of Portland. The Chancellor's sworn statement refers to Archbishop  
21 Howard as "duly appointed, authorized and empowered as such successor  
22 according to the canons, usages and regulations of the Roman Catholic  
23 Church." Supplementary Articles of Incorporation, filed December 6,  
24 1939, attached as Exhibit 1 pp. 7-11 of the Declaration of Timothy Conway  
25 filed May 11, 2005.

26 Finally, the 1940 supplementary articles of incorporation provide  
that Archbishop Howard

and his successor or successors, will hold said office or position,  
in said Archdiocese under the canons, rules and usages of the Roman  
Catholic Church until death, resignation or deposition, and whenever  
said office or position shall become vacant by either the death,  
resignation or deposition of the incumbent, his successor shall and  
will be chosen or appointed under and in accordance with the canons,  
rules and regulations of said Church . . . .

Supplementary Articles of Incorporation, filed January 12, 1940, attached  
as Exhibit 1 pp. 12-18 of the Declaration of Timothy Conway filed May 11,  
2005.

1 canons of the Roman Catholic Church. They do not give notice to third  
2 parties that canon law will govern the creation of property interests.  
3 The articles of incorporation provide that one of the purposes of the  
4 corporation is "for acquiring, holding and disposing of church property  
5 for the benefit of the Roman Catholic Church[.]" Id. at 4. Nothing in  
6 this statement of purpose requires application of canon law to the  
7 acquisition, holding, and disposition of church property.

8 I conclude that debtor's articles of incorporation allow the  
9 corporation sole to be operated according to canon and other internal  
10 church law. They do not, however, provide that canon law governs  
11 property ownership in the secular world.

12 D. Religious Freedom Restoration Act

13 The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb  
14 - 2000bb-4, prohibits the government from imposing a substantial burden  
15 on a person's exercise of religion, absent a compelling state interest.<sup>17</sup>

---

16  
17 <sup>17</sup> Section 2000bb-1 provides:

18 (a) **In general**

19 Government shall not substantially burden a person's exercise  
20 of religion even if the burden results from a rule of general  
applicability, except as provided in subsection (b) of this section.

21 (b) **Exception**

22 Government may substantially burden a person's exercise of  
23 religion only if it demonstrates that application of the burden to  
24 the person--

25 (1) is in furtherance of a compelling governmental interest;  
and

(continued...)



1 Defendants raise two different RFRA arguments in defense to the TCC's  
2 claims. First, they argue that RFRA requires the court to rule under  
3 § 541 of the Bankruptcy Code that the assets of the parishes are separate  
4 from the assets of debtor because, under canon law, parish property is  
5 owned by the parish. Second, they argue that use of the bankruptcy  
6 trustee's powers as a bona fide purchaser of real property under  
7 § 544(a)(3) to avoid any unrecorded interests in parish and school real  
8 property would substantially burden the exercise of religion by those who  
9 have contributed to the acquisition and maintenance of parish and school  
10 property and who worship and are educated there. Although these  
11 arguments are made and supported somewhat differently in defendants'  
12 responses to both of the TCC's motions for summary judgment that are  
13 currently before the court, I will address both arguments in this  
14 opinion, because the Second Restated Motion for Partial Summary Judgment  
15 seeks dismissal of the RFRA defenses.

16 RFRA "essentially requires the government to justify any regulation  
17 imposing a substantial burden on the free exercise of religion by showing  
18 that the regulation satisfies strict scrutiny." Goehring v. Brophy, 94  
19 F.3d 1294, 1298 n.4 (9th Cir. 1996)(quoted with approval in Worldwide

---

20  
21 <sup>17</sup>(...continued)

22 (2) is the least restrictive means of furthering that  
23 compelling governmental interest.

24 (c) **Judicial relief**

25 A person whose religious exercise has been burdened in  
26 violation of this section may assert that violation as a claim or  
defense in a judicial proceeding and obtain appropriate relief  
against a government. . . .

1 Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1120  
2 (9th Cir. 2000)). RFRA puts the burden on the person invoking it to show  
3 that the neutral law being applied will substantially burden the free  
4 exercise of religion. See 42 U.S.C. § 2000bb-1(a).

5 Different courts have articulated the substantial burden test  
6 differently. Under the Ninth Circuit's interpretation of RFRA, which is  
7 the standard that I must apply,

8 the religious adherent, . . . has the obligation to prove that a  
9 governmental regulatory mechanism burdens the adherent's practice of  
10 his or her religion by pressuring him or her to commit an act  
11 forbidden by the religion or by preventing him or her from engaging  
12 in conduct or having a religious experience which the faith  
13 mandates. This interference must be more than an inconvenience; *the*  
14 *burden must be substantial and an interference with a tenet or*  
15 *belief that is central to religious doctrine.*

16 Goehring, 94 F.3d at 1299 (citation omitted; alteration and emphasis in  
17 the original)(quoted with approval in Worldwide Church of God v.  
18 Philadelphia Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000)).  
19 Substantial burden "must be more than an inconvenience." Bryant v.  
20 Gomez, 46 F.3d 948, 949 (9th Cir. 1995)(quoted with approval in Worldwide  
21 Church of God, 227 F.3d at 1121).

22 Defendants argue that, in determining what is property of the  
23 bankruptcy estate under § 541, the court's failure to recognize the  
24 separation of Archdiocesan assets from assets of the parishes, as is  
25 required by canon law,<sup>18</sup> would be a substantial burden on religious  
26 exercise. The TCC responds that enforcing bankruptcy and state law in

---

<sup>18</sup> There does not seem to be any dispute that, under canon law,  
parish churches and associated properties are "owned" by the parishes.

1 this case to determine what property is part of the bankruptcy estate  
2 would not substantially burden the exercise of religion.<sup>19</sup>

3 I question whether RFRA applies at all to a determination of what is  
4 property of the bankruptcy estate under § 541. Section 541 merely  
5 defines what property is included in a bankruptcy estate; issues such as  
6 ownership of property are determined by application of state law. See  
7 Butner v. United States, 440 U.S. 48, 55 (1979). It is not clear to me  
8 how RFRA applies to determination of a status, that is, ownership of  
9 property, that is a result of application of state law.<sup>20</sup> The TCC does  
10 not, however, argue that RFRA is inapplicable to church property

---

11  
12 <sup>19</sup> The TCC does not argue that RFRA is unconstitutional as applied  
13 to federal law, recognizing that the Ninth Circuit has rejected that  
14 argument. See Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002)(although  
the Supreme Court declared RFRA unconstitutional as applied to the  
states, it is not unconstitutional as applied to the federal government).

15 <sup>20</sup> There is another problem with application of RFRA in the  
16 context of a church property dispute. The purpose of RFRA was to restore  
17 the compelling state interest test for laws that produce a substantial  
18 burden on a person's exercise of religion, a test the Supreme Court had  
19 abandoned as a matter of constitutional law in Employment Div. v. Smith,  
20 494 U.S. 872 (1990). The compelling state interest test had required  
application of strict scrutiny to application of any religiously neutral  
law that had the effect of burdening the exercise of religion. See,  
e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374  
U.S. 398 (1963).

21 Before the Court decided Employment Div. v. Smith, however, the  
22 Supreme Court had not applied the strict scrutiny analysis to disputes  
23 involving church property. Instead, it had held that courts had a choice  
24 to follow either a policy of deference to the highest authority of a  
25 hierarchical religious organization, if that authority had spoken on the  
26 question, or to apply neutral principles of secular law in order to  
resolve the dispute. There is no indication that RFRA was intended to  
change that approach to the analysis of disputes over ownership of church  
property.

1 ownership disputes, so for purposes of this motion I will assume that  
2 RFRA has potential application.

3 Even applying RFRA to the question of who owns the church property,  
4 I agree with the TCC that defendants have not shown that applying  
5 § 541(a) of the Bankruptcy Code would substantially burden their exercise  
6 of religion. Section 541(a) makes all interests in property of a debtor  
7 as of the commencement of the case property of the bankruptcy estate.  
8 Property interests are determined by state law, to which RFRA does not  
9 apply. To the extent the Bankruptcy Code requires debtors, including  
10 religious institutions, to follow state law in establishing and  
11 protecting property rights, debtor does not explain how that requirement  
12 of bankruptcy law substantially burdens the free exercise of religion. A  
13 determination under § 541 is simply a determination of status, that is,  
14 who owns property. It is hard to understand how the court's  
15 determination of what constitutes property of the bankruptcy estate under  
16 § 541 could impose a substantial burden on the exercise of religion.

17 Further, it is not clear that § 541 is inconsistent with canon law.  
18 Section 541(d) carves out of the bankruptcy estate "[p]roperty in which  
19 the debtor holds, as of the commencement of the case, only legal title  
20 and not an equitable interest[.]" Thus, if defendants can show that,  
21 under state law, the disputed properties are held by the Archdiocese in  
22 trust for the parishes and schools, § 541 would recognize that trust  
23 relationship, subject to the avoidance provisions of § 544(a)(3).

24 Debtor argues that "it is astounding that the TCC contends that  
25 there would be no 'substantial burden on religious exercise' were this  
26

1 Court to combine the assets of 124 parishes into the Debtor's estate,  
2 contrary to the very Canon Law governing both." Debtor's Brief in  
3 Response to Tort Claimants Committee's Restated Second Motion for Partial  
4 Summary Judgment at 46-47. It then cites cases in which courts have held  
5 that applying § 548 of the Bankruptcy Code to avoid the transfer of  
6 tithes given by individual debtors to churches in the year prior to the  
7 filing of a bankruptcy petition would be a substantial burden on the  
8 debtors' exercise of religion.

9 The problem with this argument is that debtor does not point to  
10 anything in the Code of Canon Law that requires it to hold title to the  
11 property as it does, or to anything in state or federal law that  
12 prohibits it from effectuating its view of property ownership by  
13 complying with neutral secular laws. The secular law provides debtor  
14 with the ability to use neutral civil law to create and protect its  
15 property interests consistent with the tenets of the church. For  
16 example, state law would allow the parishes and schools to be separately  
17 incorporated as nonprofit corporations, thereby empowering them to hold  
18 title to real property; neither debtor nor the other defendants have  
19 pointed out anything in canon law that would preclude such separate  
20 incorporation. In the alternative, a religious organization such as  
21 debtor could show on the title to real property that it holds the  
22 property in trust for some other legal entity or person.

23 If a religious organization's manner of holding property fails under  
24 neutral civil law to protect its internal view of property ownership, but  
25 such internal view could have been accommodated by civil law, the burden  
26

1 on the exercise of religion is caused not by the neutral law but by the  
2 religious organization's own choice.<sup>21</sup> That is the situation in this  
3 case and is unlike tithing, to which defendants analogize. There was  
4 nothing the individual believer who tithed could do to protect his or her  
5 religiously motivated giving from avoidance in bankruptcy (before the  
6 Bankruptcy Code was changed to protect such voluntary transfers, see  
7 § 548(a)(2)).

8 Defendants argue that applying neutral laws to disregard the  
9 separateness of parishes from the archdiocese would substitute one church  
10 administrator (the Archbishop) for another (the parish priest), in  
11 violation of canon law that gives the parish priest certain authority  
12 over parish property. They also argue that disregarding the parishes as  
13 ecclesiastical entities would rewrite church polity and governance and  
14 eviscerate the authority of the parish priests.

15 The court's obligation is to apply neutral principles of law to  
16 determine property of the estate. As long as neutral civil law does not  
17 preclude the church from holding property in a way that recognizes  
18 internal church law concepts of property ownership, holding a church  
19 organization to the consequences of the choices it has made about how to  
20 organize its affairs with relation to the secular world, including its

---

21  
22 <sup>21</sup> In fact, one parish in the Portland Archdiocese, the St.  
23 Elizabeth Parish of Portland, Oregon, is incorporated as a religious  
24 corporation. Declaration of Timothy J. Conway in Support of Tort  
25 Claimants Committee's Second Motion for Partial Summary Judgment, Exh.  
26 22. There is also evidence that other parishes in the Portland  
Archdiocese were separately incorporated but have been dissolved, and  
that parishes in other dioceses are separately incorporated under state  
nonprofit corporation laws.

1 choice of how to hold title to property, does not substantially burden  
2 the exercise of religion. What defendants ask this court to do in the  
3 name of religious freedom is to disregard the choice debtor has made  
4 about how to hold property under civil law, because of their argument  
5 that the choice leads to a result not consistent with canon law. It is  
6 not for the civil courts to enforce canon law if the actions of the  
7 religious organization under applicable civil law do not effectuate what  
8 canon law requires.

9 I conclude that applying neutral secular principles of law to  
10 determining rights in property for purposes of this bankruptcy case would  
11 not violate RFRA.

12 The Parish Committee argues that applying § 544(a)(3)<sup>22</sup> to avoid any  
13 unrecorded interests in the parish and school real property would violate  
14 RFRA, because they made religiously motivated contributions to their  
15 parishes, not to the Archdiocese, and taking the fruits of their  
16 contributions to pay the claims of the Archdiocese would substantially  
17 burden the exercise of their religion. I am not persuaded. Because, as  
18 I explain below, the parishes are merely parts of the Archdiocese, the  
19 contributions made to the parishes were in effect made to the  
20 Archdiocese. Using the fruits of the contributions to pay claims against  
21 the Archdiocese does not impose a substantial burden.

---

22  
23 <sup>22</sup> Section 544(a)(3) gives to a bankruptcy trustee the powers of a  
24 hypothetical bona fide purchaser of real property of the debtor as of the  
25 commencement of the case, and allows the trustee to avoid any interests  
26 in property that could be avoided by that hypothetical bona fide  
purchaser.

1 Defendants also argue that applying § 544(a)(3) would violate RFRA,  
2 because they need parish churches in which to worship and to engage in  
3 the sacraments that mark religious occasions in their lives, such as  
4 baptisms, marriages, and funerals. The TCC argues that the loss of some  
5 of the parish churches would not substantially burden defendants'  
6 exercise of religion, because there is no constitutional right to worship  
7 in any particular building, and the parishioners could attend alternate  
8 parishes if their particular parish church were sold. According to the  
9 TCC, the need to attend an alternate parish might be an inconvenience,  
10 but it does not prevent the parishioners from having the religious  
11 experience that the faith mandates.

12 Unlike § 541(a), which simply effectuates the choices debtor has  
13 made under state law about how to hold title to property, § 544(a)(3) is  
14 a federal law that has the potential to alter the property rights of the  
15 debtor and a third party in property titled in debtor's name on the date  
16 of bankruptcy. It gives to the bankruptcy trustee (or someone authorized  
17 to exercise the powers of the trustee) the ability to avoid certain  
18 interests in real property that would not be avoidable under state law if  
19 there were no actual bona fide purchaser of real property.

20 RFRA would prevent avoidance of the asserted beneficial interests of  
21 parishioners and those who have donated and sent children to the  
22 Archdiocesan high schools only if that avoidance would substantially  
23 burden the exercise of religion. I conclude that there is a question of  
24 fact as to whether avoidance of any such interests would substantially  
25 burden the exercise of religion.  
26



1       The result of a successful § 544(a)(3) claim in this case could mean  
2 that the asserted interests of parishioners and other donors would be  
3 avoided on all or substantially all of the parish and school real  
4 properties, on which the parish churches and Archdiocesan high schools  
5 are located. Once those interests are avoided, the property could be  
6 used to meet the claims of creditors, free of any interests of the  
7 parishioners and other donors. In order to use the properties to meet  
8 the claims of creditors, the properties could be sold, which would make  
9 those churches and schools unavailable to the parishioners and school  
10 children to use for worship and education.

11       The First Amendment expert for the TCC acknowledged at oral argument  
12 on this motion for summary judgment that § 544(a)(3) could impose a  
13 substantial burden if the ultimate result were the use of all of the real  
14 property titled in debtor's name to satisfy the claims of debtor's  
15 creditors, thereby making those properties unavailable for worship and  
16 other church purposes. The TCC's expert argued that, if less than 99  
17 percent of the churches were taken to satisfy claims of creditors, the  
18 burden would be merely incidental, not substantial.

19       The possibility that the result of the TCC's § 544(a)(3) claim could  
20 be the loss of all parish church and Archdiocesan school properties  
21 titled in debtor's name raises a question of fact regarding whether  
22 application of § 544(a)(3) would impose a substantial burden on the  
23 parishioners' exercise of religion. Without knowing the amount of the  
24 claims or the value of the real property, or what alternatives  
25 parishioners and school children would have for worship and religious  
26

1 education, I cannot tell whether application of § 544(a)(3) would create  
2 a substantial burden on the exercise of religion. The burden might not  
3 be substantial, depending on the number of properties that must be sold  
4 to pay claims of creditors and whether there are alternative locations  
5 for worship and religious education. But if application of the statute  
6 leaves the parishioners and school children with no place to worship and  
7 study, because no facilities are available, and if they establish that  
8 worship and study are central to religious doctrine, the burden could be  
9 substantial.

10 This is summary judgment, and the evidence does not give the answers  
11 to those questions.

12 If defendants can show a substantial burden, then the question is  
13 whether the government has a compelling interest in application of  
14 § 544(a)(3). The TCC argues that the government has a compelling  
15 interest in the uniform and predictable enforcement of the Bankruptcy  
16 Code and in maintaining an equitable system for protecting creditors and  
17 providing debtors with a fresh start.

18 Although I do not doubt the importance of the uniform application of  
19 the Bankruptcy Code and implementation of the policies of bankruptcy law,  
20 I agree with the Eighth Circuit's view articulated in the first Young  
21 case that "the interests advanced by the bankruptcy system are not  
22 compelling under the RFRA." In re Young, 82 F.3d 1407, 1420 (8th Cir.  
23 1996). The purpose of § 544(a)(3) is to maximize the bankruptcy estate  
24 and thereby maximize the recovery for creditors. But the Bankruptcy Code  
25 itself contains various provisions that limit the breadth of the estate,  
26

1 including, for example, § 541(d), which excludes from the bankruptcy  
2 estate property in which a debtor holds only legal but not equitable  
3 title. There are also exceptions in the Bankruptcy Code to the policy of  
4 providing a debtor with a fresh start, such as the exceptions to  
5 discharge set out in § 523(a). Thus, the Bankruptcy Code itself provides  
6 for exceptions that do not further the policies of the Code. In light of  
7 those exceptions, I conclude that there is no compelling governmental  
8 interest in applying § 544(a)(3), if doing so would impose a substantial  
9 burden on the exercise of religion.

10 If, after a trial, defendants show that application of § 544(a)(3)  
11 would impose a substantial burden on the exercise of religion, the  
12 question would become what remedy would be appropriate. RFRA provides  
13 that "[a] person whose religious exercise has been burdened in violation  
14 of [RFRA] may . . . obtain appropriate relief against a government." 42  
15 U.S.C. § 2000bb-1(c) (emphasis supplied). There are many forms that  
16 relief might take. One possibility might be to limit the number of  
17 properties subject to the avoidance powers of § 544(a)(3), if it is shown  
18 that the loss of some but not all of the churches and schools would be  
19 inconvenient but not substantially burdensome. What relief would be  
20 appropriate is a question left for another day.

21 There is a question of fact as to whether application of § 544(a)(3)  
22 would impose a substantial burden on defendants. Therefore, I will deny  
23 summary judgment on defendants' religious freedom defenses, to the extent  
24 they assert violations of RFRA by application of § 544(a)(3).

25 E. Conclusion  
26

1 I conclude that none of the authorities cited by defendants, the  
2 constitution, RFRA, the corporation sole statute, nor debtor's articles  
3 of incorporation, require that canon law be considered in applying  
4 neutral principles of law to determine the question of ownership of  
5 property by this bankruptcy estate. There is a question of fact as to  
6 whether applying § 544(a)(3) to avoid unrecorded interests in real  
7 property would be a substantial burden on the exercise of religion.  
8 Therefore, the TCC is entitled to summary judgment on the religious  
9 freedom affirmative defenses, except the RFRA defense to the § 544(a)(3)  
10 claim.

11 3. Are the parishes separate entities from debtor?

12 The TCC seeks a ruling that the "parishes and schools have no legal  
13 existence separate from or independent of Debtor and do not have the  
14 capacity to sue or be sued." TCC's Restated Second Motion for Partial  
15 Summary Judgment at 2. Debtor seeks a ruling that "[t]he Parishes and  
16 the Debtor are separate entities." Debtor's Cross Motion for Partial  
17 Summary Judgment at 3.

18 Whether the parishes and Archdiocesan high schools have separate  
19 legal existence is relevant. If they are merely part of the corporate  
20 debtor, then, as I discuss below, they are not entities that can hold  
21 title to real property or be beneficiaries of trusts. If they are not  
22 separate enough from debtor to sue and be sued, then they cannot assert  
23 claims against debtor. Therefore, I will consider the parties' arguments  
24 on this issue.

25 I first note that debtor does not argue that the Archdiocesan high  
26

1 schools are separate entities from debtor; it merely argues that the  
2 parishes are separate. The parties appearing on behalf of the  
3 Archdiocesan high schools (Marist, Central Catholic, and Regis High  
4 Schools) do not argue that they are separate entities from debtor, but  
5 instead argue that whether or not they are separate is irrelevant to the  
6 question of whether the school property is held in charitable trust.  
7 Because there does not appear to be a dispute that the three Archdiocesan  
8 high schools have no separate legal existence, the TCC is entitled to  
9 summary judgment that Marist, Central Catholic, and Regis High Schools  
10 are not civil entities separate from debtor.<sup>23</sup>

11 I turn now to the parishes.<sup>24</sup> Debtor argues that, under canon law,  
12 currently codified in The Code of Canon Law (1983), each parish and  
13 diocese is a separate entity known as a "public juridic person," and that  
14 each public juridic person owns its respective temporal goods. See,  
15 e.g., Code of Canon Law c. 116 § 1; c. 373; c. 515 § 1; c. 1256. It also  
16 argues, and provides evidence to support its argument, that the parishes  
17 operate in many ways independently of the archdiocese. From those  
18 propositions, it asserts that this court must recognize the parishes as  
19 separate legal entities from debtor, each of which may own its own  
20

---

21 <sup>23</sup> As I explained above, I do not address at this juncture the  
22 argument of the representatives of the schools and debtor that the  
23 parishes and school properties are held in charitable trust. That  
24 question goes beyond what is at issue in this summary judgment  
25 proceeding.

26 <sup>24</sup> This discussion does not apply to St. Elizabeth Parish, which  
is separately incorporated. The TCC does not dispute that St. Elizabeth  
Parish is a legal entity separate from debtor.

1 property.

2 As I said in the earlier discussion, in this dispute, canon law is  
3 not applicable to the question of whether the parishes have separate  
4 civil law existence. Even assuming that the parishes operate  
5 independently of debtor (and there is a question about how much  
6 independence they really have), independent operation does not make them  
7 separately recognizable legal entities.

8 Even debtor's own canon law expert acknowledges that being a  
9 separate juridic person under canon law does not give that juridic person  
10 a civil law identity. In his book Church Property, Church Finances, and  
11 Church-Related Corporations, Nicholas Cafardi explained that

12 [t]he public juridic person, as such, has no civil law equivalent  
13 and no civil law identity. Its only existence is juridical in the  
14 canon law. It is a religious concept and not a civil one.

15 Adam J. Maida and Nicholas P. Cafardi, Church Property, Church Finances,  
16 and Church-Related Corporations 131 (1984). Thus, although canon law  
17 gives parishes separate canonical existence, it does not give them  
18 separate civil law existence.

19 Under Oregon law, religious corporations including corporations sole  
20 are authorized to sue and be sued, and to hold and dispose of property.  
21 ORS 65.074. Debtor does not cite any state law that would authorize  
22 unincorporated parishes to sue and be sued or to hold and dispose of real  
23 property.<sup>25</sup> In fact, unincorporated religious associations are not legal

---

24 <sup>25</sup> Debtor points to its list of lawsuits pending at the time of  
25 bankruptcy, filed in response to a question on the Statement of Financial  
26 Affairs, which it says shows that parishes have in fact been sued.  
(continued...)

1 persons that may take title to real property in their names. See, e.g.,  
2 State v. Sunbeam Rebekah Lodge No. 180 of Hermiston, 169 Or. 253, 266  
3 (1942); Liggett v. Ladd, 17 Or. 89 (1888). Because the parishes are not  
4 separately incorporated, as they could be under Oregon religious  
5 corporations law, they cannot hold title to real property. They are not  
6 separate from, but are merely a part of debtor. Accord F.E.L.  
7 Publications, Ltd. v. Catholic Bishop of Chicago, 754 F.2d 216, 221 (7th  
8 Cir. 1985)(Catholic parishes not separate and independent entities from  
9 Catholic Bishop, so Bishop could not be liable for interfering with  
10 business relationship of parishes and third party); E.E.O.C. v. St.  
11 Francis Xavier Parochial School, 77 F. Supp. 2d 71 (D.D.C. 1999), aff'd,  
12 254 F.3d 315 (D.C. Cir. 2000)(table)(parish was unincorporated division  
13 of archdiocese, which was a corporation sole, and therefore could not be  
14

15 <sup>25</sup>(...continued)

16 Declaration of Thomas W. Stilley, Exh. 5. According to debtor's list, in  
17 many of those cases, the parish was sued as an assumed business name of  
18 debtor. In none was the parish or school sued independently of debtor.  
19 Further, nothing in the exhibit shows the outcome of the lawsuit against  
20 the parish or school; it is entirely possible that the parish or school  
21 could successfully defend by claiming that it was not an entity that had  
22 the capacity to be sued. I am not persuaded that the fact that a  
23 plaintiff names an entity in a lawsuit provides evidence that the entity  
24 has the capacity to be sued.

21 Debtor also notes that four parish schools (Blanchet Catholic  
22 School, St. Joseph School, Queen of Peace School, and St. Vincent de Paul  
23 School) are registered with the Oregon Secretary of State as authorized  
24 representatives of the Oregon Wine and Food Festival. The assumed  
25 business name on record with the state is the Oregon Wine and Food  
26 Festival, not the schools themselves, which are merely authorized  
representatives of the festival. That evidence does not create a  
question of fact as to whether the schools themselves are separate legal  
entities authorized to hold title to real property under Oregon law.

1 sued).

2 This result is consistent with the position that debtor has taken in  
3 other legal proceedings. For example, in its answer to a complaint filed  
4 in state court, debtor admitted that "the Church of St. Michael The  
5 Archangel is a parish of the Archdiocese under the Canon Law of the Roman  
6 Catholic Church, . . . but that the parish is not a separate secular  
7 legal entity." Declaration of Michael Fletcher filed October 26, 2005,  
8 Exhibit 12 at p. 1. The Archdiocese has also taken the position that  
9 schools run by the parishes are part of and not separate from the  
10 Archdiocese. See Declaration of Timothy Conway filed May 11, 2005,  
11 Exhibits 6 and 7. Although I do not rely on those positions to reach my  
12 conclusion, they do show that debtor has considered the issue in the past  
13 and has reached the same conclusion as I do today.

14 Debtor argues that, even if the parishes are not legal entities that  
15 can hold title to real property, they have sufficient legal existence to  
16 allow them to be beneficiaries of a trust. They point to the recognition  
17 of churches as separate entities in various statutory schemes.  
18 Specifically, they point to the Internal Revenue Code, which provides an  
19 exemption from taxation for "any community chest, fund, or foundation,  
20 organized and operated exclusively for religious, [or] charitable . . .  
21 purposes," 26 U.S.C. § 501(c)(3); the Bankruptcy Code, which excludes  
22 charitable contributions "to a qualified religious or charitable entity"  
23 from fraudulent transfer avoidance, 11 U.S.C. § 548(a)(2); and Oregon's  
24 Charitable Trust and Corporation Act, which defines "religious  
25 organization" as "any organized church or group organized for the purpose  
26



1 of divine worship, religious teaching, or other directly ancillary  
2 purposes." ORS 128.620(4).<sup>26</sup>

3 Those statutes do not provide support for concluding that parishes  
4 are sufficiently separate from debtor to be the beneficiaries of trusts.  
5 If anything, they show that, if an unincorporated religious organization  
6 is to have legal status for some purpose, a statute must expressly  
7 provide for such status.

8 "A person who has the capacity to take and hold legal title to  
9 property has the capacity to be the beneficiary of a trust of such  
10 property." 76 Am. Jur. 2d Trusts § 240 (2005). Thus, natural persons  
11 have the capacity to be beneficiaries of trusts, as do corporations. 2  
12 Mark L. Ascher, et al., Scott on Trusts § 116 (4th ed. 2001).  
13 Unincorporated associations also may be beneficiaries of a trust.  
14 Restatement (Second) of Trusts § 119 (1959); Good Samaritan Hosp. and  
15 Med. Ctr. v. U.S. Nat'l Bank, 246 Or. 478 (1967).

16 There is no authority to which the parties direct me or of which I  
17 am aware, however, that would allow a division of a corporation or a unit  
18 or part of a legal entity to be a beneficiary of a trust. It is one  
19

---

20 <sup>26</sup> The definition of "religious organization" in the Charitable  
21 Trust and Corporation Act does not assist debtor. The Act exempts  
22 religious organizations from many of its provisions. ORS 128.640(2).  
23 Those provisions that do apply to such organizations relate primarily to  
24 the authority of the attorney general to investigate and enforce the  
25 provisions of the Act. ORS 128.680 - 128.710; 128.720 - 128.750.  
26 Nothing in the Charitable Trust and Corporation Act even hints at  
providing authority for an unincorporated religious organization to hold  
property in its own right or to sue or be sued, other than by the  
attorney general in his or her regulatory capacity. See ORS 128.680 -  
128.710.

1 thing to hold that an independent unincorporated association has the  
2 capacity to be the beneficiary of a trust. It is quite another to hold  
3 that a corporation can hold property in trust for a unit or part of  
4 itself.

5 Debtor has chosen to organize its operations under a corporation  
6 sole. It chose to separately incorporate (or allow the separate  
7 incorporation of) St. Elizabeth Parish; it could also have chosen to  
8 incorporate the other parishes as religious corporations, by which they  
9 would gain a civil legal status and could exercise the powers granted to  
10 such corporations, including the power to hold and dispose of property  
11 and to sue and be sued. Debtor did not, however, choose to do that, and  
12 gives no reason why it could not, under state law, have separately  
13 incorporated the parishes or in some other way organized itself to  
14 protect the canonical ownership rights, if any, of the schools and  
15 parishes. The existence of St. Elizabeth Parish is evidence that such  
16 incorporation is possible and acceptable.<sup>27</sup>

17 The TCC is entitled to summary judgment that the parishes and  
18 schools are not separate legal entities with the capacity to sue or be  
19 sued. Debtor's cross-motion for summary judgment will be denied.

#### 20 V. CONCLUSION

21 There is no First Amendment impediment to this court's jurisdiction  
22 to determine whether property in which title is held by debtor belongs to  
23

---

24 <sup>27</sup> Debtor proposes in its plan of reorganization that it have the  
25 right to alter the organization and structure of debtor, including  
26 possibly incorporating each of the parishes and schools. Debtor's  
Chapter 11 Plan of Reorganization, filed November 15, 2005, at ¶ 8.8.

1 the bankruptcy estate or to others. The requirements of protection of  
2 religious freedom, including RFRA, do not prohibit this court from  
3 deciding this issue. No federal constitutional or statutory law, nor  
4 state statute, nor debtor's articles of incorporation require application  
5 of the Code of Canon Law to the determination of whether the disputed  
6 property is property of the bankruptcy estate. Under civil law, the  
7 parishes and high schools are not separate civil legal entities that have  
8 the capacity to sue and be sued or to be beneficiaries of trusts.

9 There is a question of fact whether RFRA would preclude avoidance of  
10 all unrecorded interests in real property titled in debtor's name.  
11 Therefore, the TCC are not entitled to summary judgment on the RFRA  
12 defense to the § 544(a)(3) claim.

13 The TCC's restated second motion for partial summary judgment will  
14 be granted, except that it will be denied with regard to the RFRA defense  
15 to the § 544(a)(3) claim. Debtor's cross-motion for partial summary  
16 judgment will be denied. Mr. Kennedy should submit the order.

17 ###

18  
19 cc: Howard M. Levine  
20 Albert N. Kennedy  
21 Brad T. Summers  
22 Steven M. Hedberg  
23 Brad S. Copeland  
24 Phoebe Joan O'Neill  
25 James Ray Streinz  
26 David Foraker

